REPUBLIC OF KENYA

THE JUDICIARY
OFFICE OF THE SPORTS DISPUTES TRIBUNAL
DOPING CASE NO 11 OF 2017

ANTI-DOPING AGENCY OF KENYA..... APPLICANT

-VERSUS-

EDWIN KIPYEGO..... RESPONDENT

DECISION

Hearing : 18th October, 2017

Panel :

Mr. John M Ohaga	-	Chair
Ms. Njeri Onyango	-	Member
Ms. Mary Kimani	-	Member

Appearances: Mr. Erick Omariba, Advocate for the Applicant;

Ms. Munyasya, Advocate instructed by the firm of Munyasya & Company for the Athlete.

Edwin Kipyego - Athlete

ABBREVIATIONS AND DEFINATIONS

The following abbreviation used here in have the indicated definitions

ADAK-Anti-doping Agency of Kenya

ADR-Anti- Doping Rule Violation

AK-Athletics Kenya

IAAF-International Association of Athletics Federation

S.D.T-Sports Dispute Tribunal

WADA-World Anti-Doping Agency

All the definitions and interpretation shall be construed as defined and interpreted in the constitutive document both local and international.

1. THE PARTIES

   1.1 The applicant The Anti -Doping Agency of Kenya (ADAK) is a State Agency established under section 5 of the Anti-Doping Act No.5 of 2016. It is the body charged with managing Anti-Doping activities in the country including results management.

   1.2 EDWIN KIPGEYO (the Respondent) is a male long-distance runner, specializing in a distance 3000m upwards. He is a police officer of the rank of constable, serving in the National Police Service, Kenya.

   1.3 The Sports Dispute Tribunal (hereafter 'Tribunal') is an independent sports Arbitration Institution created under the provisions of the Sports Act, 2013, Laws of Kenya. Members of the Tribunal are appointed in terms of section 6 of the said Act.

2. THE CHARGE

2.1 By a charge dated 5th September, 2017 and filed at the Tribunal on the 6th September 2017, the Respondent is charged with "Presence of a prohibited substance Erythropoietin (EPO) in the athlete's sample. |"

2.2 The presence of a prohibited substance or its metabolites or markers in an athlete's sample or the use of a prohibited substance constitute an anti-doping rule violation under Article 2.1 of WADC and rule 32.2 and rule 32.2(b) of the IAAF rules.

2.3 Article 2.1.2 provides

"It is each athlete's personal duty to ensure that no prohibited substance enters his or her body. Athletes are responsible for any prohibited substance or the metabolites or markers found present in their sample."

Accordingly, it is not necessary that intent, fault, negligence or knowingly use on the athlete's past be demonstrated in order to establish an anti-doping rule violation under Article 2.1

2.4 The respondent participated in the Kenya Police National Championships Nairobi, on 18th may, 2017, where in competition his urine sample was collected.

2.5 The sample was transported to the WADA accredited laboratory in Paris France where the 'A' sample was analyzed in accordance with the procedure set out in WADA's international standard for laboratories. The A sample returned an AAF for the presence of a prohibited substance Erythropoietin.

2.6 Erythropoietin is listed as a prohibited substance under section 2 of the 2017 WADA prohibited list and in a non-specified substance (Article 4.2.2 of WADC)

2.7 The respondent was notified of the AAF by a letter from ADAK dated 7th July 2017. He was also notified of his right to pursue the testing of the 'B' sample but he elected not to pursue that option.

2.8 ADAK in its charge document states that the Respondent has failed to explain the presence of Erythropoietin in his sample and is guilty as "The presence of prohibited substance or its metabolites or markers in the athlete's sample or the use of a prohibited substance constitutes an anti-doping rule violation under Article 2.1. of ADAK ADR..."

2.9 ADAK therefore states that as no explanation has been rendered nor any mitigating factor set out for reduction of the sanction as provided in the rules, it prays that

a) All competitive results obtained by Edwin Kipyego from and including 18th May,2017 until the date of determination of the matter herein be disqualified with all resulting consequences (including forfeiture of medals points and prizes)". **Article 10.1 ADAK ADR**

b) Edwin Kipyego be sanctioned to a four year period of ineligibility as provided by ADAK Anti-Doping Code. Article **10 of ADAK and WADC Rules**.

c) Costs. Article **10.10**

3. JURISDICTION

3.1 The Sports Dispute Tribunal has jurisdiction under Section 55, 58 and 59 of the Sports Act NO.25 OF 2013 and Section 31 and 32 of the Anti-Doping Act No.5 of 2016 as Amended to hear and determine this case.

3.2 ADAK states that the ingestion of the prohibited substance by the Athlete was intentional and no possible explanation can be given on fault or negligence by the athlete or a third party.

4. PRELIMINARY MATTERS

4.1. The matter first came to the Tribunal by way of a notice of charge filed at the Tribunal on 27th July, 2017. It was mentioned before the Tribunal Chairman on the same day for directions.

4.2. Directions were granted requiring ADAK to file a formal charge to be served upon the Respondent and the matter to be further mentioned on 22/8/2017 to confirm compliance and for further directions. A hearing panel of Mr. John Ohaga, Ms. Maria Kimani and Njeri Onyango was constituted.

4.3. The matter was however mentioned on 31/8/2017, the Respondent had been served and was present. ADAK had however not yet filed the formal charge and supportive documents. The athlete also requested for time to appoint an Advocate.

4.4. ADAK was directed to file and serve the charge upon the Respondent or directly upon his appointed Counsel once appointed, but in the meantime Ms. Sarah Ochwada, Advocate of Center for Sports Law, was appointed as a pro-bono Counsel for the Respondent. Further mention was set for 20th September, 2017 for directions.

4.5. The Charge document was filed on 6th September, 2017. A notice of Appointment of Advocate by M/S Munyasya & Co Advocates was filed on 19/9/2017.

4.6. When the matter was mentioned on 20/9/2017 to the Respondent's Counsel in attendance Mr. Nyaanga requested for more time to respond to the charge. They were granted 21 days to do so and the matter fixed for hearing on 26th 0ctober, 2017 at 2.30 p.m.

4.7. 26th October, 2017 was declared a Public Holiday in Kenya by Gazette notice NO 10548, accordingly, this matter among others was on 23rd October, 2017 rescheduled and set for hearing on 23rd November, 2017. A notice was issued to the parties.

4.8. On 23rd November, 2017, the parties appeared. It was indicated to the Tribunal that the Respondent had provided ADAK with substantial assistance in leading to the circumstances of the ADRV, which matters ADAK was investigating. Parties agreed to take a further date for mention to allow completion of the investigations. The matter was therefore set for mention on 17/1/2018 at 2.30 pm.

4.9. On 17/1/2018, the Tribunal was informed that the information received from the athlete had been followed up with good results which may lead to other persons being charged. For this matter, it was agreed that hearing does proceed. Hearing was fixed for 15/2/2018 at 2.30 p.m.

4.10. On 15/2/2018, ADAK's Counsel was not ready to proceed. There being no objection by the Respondent, the hearing was adjourned to 22/3/2018.

4.11. On 22/2/2018, the matter came up for hearing before this panel. All the parties were present. The Respondent's Counsel Ms. Munyasya informed the Tribunal that the Respondent had not filed any response as he was conceding the charge. He had attended before ADAK and written his confession admitting to the charge against him as per the Charge dated 5/9/2017. They therefore wished to proceed with viva voce evidence to "explain"

5. THE RESPONDENT'S EVIDENCE

5.1. The Respondent Edwin Kipyego, who was in attendance was sworn and testified in English. He was identified by his National Identity Card NO 27923108. He is 28 years old (born 16/11/1990). A police officer of the rank of Constable NO 1012520.

5.2. He stated that he understood the charge and why he was before the Tribunal. He had received the ADRV notification that his sample collected during the Police Athletics Championships on 18/5/2017 at the Nyayo National Stadium had returned an AAF

5.3. He stated that during his stay at the Kiganjo Police Training College, he and a group of his friends were discussing about supplements in sports. A colleague then stated that there was a doctor who could give him multi vitamins to "assist in running". He was referred to the doctor. He did not know whether the medicine was authorized.

5.4. He later went to see the doctor he identified as Dr. Too at his clinic known as Transmart- at a small chemist. (He has taken photos of it which he had given ADAK investigators- this is contained in ADAK's documents filed herein). He went there as directed by his friends. The friends are;

1. Isaac Kimutai
2. Joshua Masikonde
3. Gilbert Kwemoi

5.5. At the clinic, he spoke to the doctor, he was given medication in the form of an injection but was not told what type or content but he thought it was multivitamin to assist in training. He paid Kshs. 4,000./=. No receipt was provided.

5.6. He therefore ran a half marathon. This was for training purposes. At the championship he did the 10 kilometers and emerged 2nd. His sample was collected then. This is the one that was analyzed and returned the AAF.

5.7. He confirmed that he had at the sample collection completed the Doping Control Form (DCF) and had indicated what he had used which he had obtained over the counter. He admitted that he did not disclose the injection as he says he did not even know what it was. In any event it had been taken in May and not within 7 days before the date of Sample Collection as was required on the form.

5.8. He stated that he is an international athlete who has participated in various events such as;

i) ½ Marathon in U.K 2016 12th March

ii) 2016- City by City ½ Marathon in Netherlands and came 1st.

iii) 2015 in Copenhagen ½ Marathon where he came 3rd.

5.9. He stated that prior to the Collection of Sample, he had generally heard about doping. He had no training but has in 2017, after the present case arose, attended training in Eldoret. At the time of receiving the injection, he really thought that he was getting a multivitamin boost.

5.10. He stated that he had an agent Mr. Peter McHuges.he is familiar with internet use and e-mail. His other colleagues run under the Demadona Giani Agency.

5.11. He prayed for a kind consideration and a sentence reduction in view of his co-operation with the investigations and the substantial assistance he has provided and will continue to assist ADAK. He vowed never to be duped into such a position in future. He will be more vigilant.

5.12. On cross-examination by Mr. Omariba, he conceded that when he went to see the doctor he was not unwell. It is just that he had been told it would "assist" him in training. He did not know that it was for enhancing performance.

6. PARTIES SUBMISSIONS.

6.1. ADAK's submissions were filed on 4/4/2018. Counsel Mr. Omariba fully relied on the charge document dated 7th July, 2017 and the annextures thereto together with the supplementary list of documents dated 5th September, 2017.

6.2. ADAK noted that the process of sample collection, travelling, transportation and analysis had been undertaken as prescribed and had not been questioned. The result giving the AAF on 'A' Sample had also not been questioned nor was there a request to test the 'B' sample.

6.3. ADAK noted that the initial response by the Respondent upon Notification of the ADRV, was that while he was in China to participate in the Yangzhou Marathon, he had been taken ill and treated at a Hospital in China where medicine

was administered on him. He had claimed that he did not know the nature and composition of the drugs administered to him at the said hospital. He had also alleged that on return to Kenya on April 25th, 2017, he had attended before a doctor, who was not named, who had prescribed some medication for him.

6.4. It was noted that there was no adequate disclosure in the DCF or any attempt to link the disclosed items in the DCF to the AAF, nor even a request for "B" sample testing.

6.5. On proof of the ADRV, ADAK fully relied on the rules as set out at Article 3.2 of the ADAK ADR (as well as WADC) ADAK would rely on methods of proof "by any reliable means including admissions"

a) ***Analytical methods or decision limits*** ....

b) WADA accredited Laboratories and other Laboratories approved by WADA are ***presumed to have conducted sample analysis*** *and custodial procedures in accordance with the international standard for Laboratories.*

c) Departures from any other international standard or other anti-doping rule or policy set forth in the code or these ANTI –Doping Rules which did not ***cause an Adverse Analytical Finding*** *or other anti-doping rule violation shall not invalidate such evidence or results.*

6.6. ADAK also relied on Art. 22.1 On the roles and responsibilities of the Athlete

a) To be knowledgeable of and comply with the anti-doping rules.

b) To be available for *sample* collection at all times.

c) To take responsibility, in the context of anti-doping, for what they ingest and use.

d) To inform medical personnel of their obligation not to use Prohibited Substances and Prohibited Methods and to take responsibility to make sure that any medical treatment received does not violate these Anti-doping rules.

e) To disclose to his or her International Federation and to the agency any decision by a non -signatory finding that he or she committed an Anti-Doping rule violation within the previous 10 years.

f) To cooperate with the Anti-doping Organization investigating Anti-doping rule violation.

6.7. ADAK therefore submitted that it had adequately discharged its burden of proof and further relied on other matters from the Respondent such as

a) He admitted the results of "Sample A "and he waived her rights to "Sample B "analysis. Thereby accepting the "Sample A" results Under Article 7.3.1.

b) The Athlete thus admitted to the presence of a prohibited substance in his sample. (Article 3.2 of ADAK ADR)

c) The Athlete admitted to knowledge of the circumstance to which the prohibited substance entered his body. He narrated the events that led him to seek the services of a "doctor "who administered an unknown drug which he claimed would improve his training and overall athletic capabilities.

d) He admitted knowledge of the whereabouts of the said medical doctor who administered the banned substance to him and pledged to assist ADAK and all other relevant authorities with the investigation on the alleged administration to the respondent as well as other athletes.

6.8. ADAK further submitted that the Respondent having admitted the presence of a prohibited substance, the strict liability provisions of Art. 2.1.1 apply, and under Art. 10.2.1 The burden shifts to the Respondent to demonstrate "No fault, negligence or intention" to entitle him to a reduction of sanction.

6.9. ADAK's position regarding the demonstration of negligence, fault and intention are;

a) The athlete bears the duty to establish how the prohibited substance entered his body, which in this case he has failed to do; and is contrary to his duty to ensure that no prohibited substance enters his body.

b) The athlete/Respondent was negligent in allowing the substance to be administered for the "benefits in athletics" without a bother to know the actual identity of the substance, which fell short of his duty set out in ADAK Rule 2.1.1. This was an act of gross negligence.

c) The athlete (Respondent) being an Elite athlete with a long career who had been tested severally, had knowledge of the existence of ADAK, ought to have known better.

6.10. ADAK invited the panel to look at the totality of the various responses and evidence of the Respondent and see that the same are a clever attempt to try and come out as an innocent error yet a look through will show a veiled intend to dope. ADAK prays that the Respondent's veiled lies be ignored and that the maximum period of ineligibility of 4 years be imposed.

6.11. The Respondent's counsel filed written submissions on 10/4/2018.

6.12. The presence of E.P.O in the Respondent's sample is admitted. They also admit that the Respondent has confessed and admit the charge and say he has explained the "existence" of the drug to the Applicants counsel, and that the Respondent has rendered substantial assistance to ADAK.

6.13. It is submitted that there was no intentional use of EPO and that the Respondent did not "know the role of Erythropoietin drug nor was it used for performance enhancement"

6.14. Counsel further submitted that the Respondent was not aware that "the drug administered to him was a prohibited substance" That his previous exemplary performance proves that he had no reason to deliberately take any forbidden

substance to enhance his performance. Thus violation of ADAK ADR was not intentional. The athlete was not "sufficiently knowledgeable" on doping matters.

6.15. Regarding the burden and standard of proof, it is submitted that "it is the responsibility of ADAK" to prove that the "Athlete used the substance intentionally for doping purposes" which it has failed to do.

6.16. In the Respondent's counsel's submissions and placing reliance on **CAS 2015/A/3945 SIGFUL FOSSDEL -VS-INTERNATIONAL POWLIFTING FEDERATION & IPF)** It is stated that the case established a lower standard to establish how the prohibited substance entered his system and that once this is met, the athlete may be absolved from any severe penalty or such penalty be reduced to a minimum of a reprimand with no period of ineligibility and a maximum of one half of the standard period of ineligibility depending on the degree of fault.

6.17. Counsel therefore invited this panel to see that the Respondent's admission and explanation on how the prohibited substance EPO entered his body, and there being no intention to enhance performance should attract a short period of ineligibility.

7. PANEL'S REVIEW OF THE MATTER

7.1. The panel is of the view from the foregoing that there are unchallenged facts. These are:

i) That the athlete Respondent has not in any way challenged the validity of the process of sample collection, handling, transportation and testing.

ii) The laboratory finding for the AAF for Erythropoietin has been admitted and the Respondent in deed waived the right for the testing of the "B" sample.

iii) E.P.O is listed as a prohibited substance under S2 of the 2017 WADA prohibited list and is a non-specified substance (Article 4.2.2 of WADC)

7.2 The issues that then render themselves for discussion, review and determination are;

i) Whether the ADRV was inadvertent

ii) The applicable period of ineligibility

iii) Whether the Respondent can benefit from any reduction

iv) What period of ineligibility to impose and any other orders.

7.3. First, we think we should deal with the question of the letter of 14/7/2017 in response to the notice of ADRV dated 7/7/2017. In that letter the Respondent made a claim that the ADVR must have been occasioned by treatment he received after a hospital admission in China after a ½ marathon race in Yangzhou around 23/4/2017. It is also alleged therein that upon return to Kenya he went to see a doctor who also prescribed some medication.

7.4. It is curious that this line was not thereafter followed to either be proved or otherwise. Instead a completely new set of circumstances is brought out in subsequent responses to the ADRV.

7.4. Upon the charge being preferred before this Tribunal, the Respondent had admitted the presence of EPO in his sample and has pointed to the source as an injection he received at a doctor's premises in Eldoret at an undisclosed date, stated to have been taken to "help in training". The nature of the testimony given before this panel at the hearing does not and cannot point to an action undertaken unknowingly or in error. The Respondent has admitted that they(with his friends) discussed the use of "supplements" that would help in training. He was referred to a specific doctor.

7.5. There is no evidence that at the time he was struggling in training in any manner or at all. In fact in late April 23/4/2017, he had participated in a ½ marathon in China and he had fared well. The police games were due in May just about a month away since the China event. By his own admission during cross-

examination, he was not sick. Also from the DCF, one gathers that he was already taking vitamin supplements which he disclosed in the form. One would then wonder what other or further supplements he required and for what purpose.

7.6. The Respondent has also admitted that he went to see a doctor he says his friends referred him to. He has not shown any prescription or attendance and treatment chit. He stated that he paid Kshs. 4,000 but obtained no receipt. The Respondent did not say when it is that he had a discussion with his friends or the approximate period in time that he went to see this doctor at Eldoret, noting that the discussions were at the Police Training College at Kiganjo which is several hundred Kilometers away from Eldoret, and would take several hours journey by road.

7.7. He then states that he went to Eldoret after the referral, to a clinic within a "small chemist" - All he needed was to tell the doctor that "he was an athlete". He does not say that he asked any questions regarding the so called prescription and injection. He did not say he conducted any research on the "doctor" to establish his qualifications. No examination was done or evaluation, but a prescription an injectable one at that was prescribed, accepted, and administered.

7.8. By his own admission, the Respondent has undergone testing before, he is familiar with the use of internet and e-mail. He has travelled variously to run in several international events. He therefore cannot be considered to be naïve or totally unknowing. In any event the provisions of both the Anti-Doping Act Kenya and the WADC make it his obligation to be knowledgeable on matters on Doping (Article 22.1) and take responsibility for what he ingests and use.

7.9. The manner in which the Respondent submits himself to the prescribed form of administration of an injectable "multivitamin" does not commend itself as an act of one who knew nothing of the process. He sought no clarification, gets an injection and parts with Kshs. 4,000 which even in Kenyan standards is a

considerable sum of money for "treatment". One would have expected him to question the process and the possible consequences. In absence of that the Respondent either knew of the process and what it entailed and therefore with intent to dope allowed it to be administered, or he acted in reckless abandon of caution for which there can be no mitigating circumstances.

7.10 In regards to the origin of the offending substance, it is the duty of the Respondent to establish the same and how it entered his body. In this case he just gave some unknown source after a treatment in China (this letter of 14/07/2017) and at the hearing he related of some injection of an unknown substance at a clinic at Eldoret .This in the panel's view in fact suggests that all along the Respondent knew what was contained in the injection given in Eldoret.

7.11 In view of the admission it is the panel's view that the ADRV has been established in the prescribed manner **(Article 3.2)** and thus from that point the burden shifts to the Respondent to demonstrate that such ADRV occurred without the any fault or negligence on his part. We think that the submissions by the Respondent's counsel regarding the burden of proof are in error and without due regard for the obligations placed on the Athlete both under the ADAK ADR and WADC.

7.12 From the Respondent's evidence at the hearing this panel is convinced that the Respondent has **NOT** demonstrated to the comfortable satisfaction of this panel (see **Maria Sharapova case -[case 2016 /A/4643]**) that the ADRV occurred without intend on his part or after the exercise of due diligence and that there is no significant fault OR NEGLIGENCE .As discussed above the panel is more included to believe that the ADRV arose from a deliberate action or an act of total and reckless abandon of duty of care expected of him and imposed by the applicable Anti-Doping Rules.

7.13 We do not agree with the Respondent's counsel submission that the ADAK has failed to discharge the burden of prove of any facts in view of there being no challenge to the laboratory findings and the admission .ADAK does not have to show that the Respondent used the substance intentionally. That burden is on the Respondent to show LACK OF INTENTION IN ORDER TO ATTRACT a reduced period of ineligibility, to show no fault or negligence .In this case the Respondent has failed to do so in both counts .In the case of **Johang[CAS 2017/A/5015]** the Athlete[Johang] had a condition she was dealing with, she used lip balm with an offending substance but overlooked the warning written on the box .For her action even without the intention to dope ,the hearing panel was not convinced that the circumstance commended themselves to a reduction of the period of ineligibility.

CONCLUSION

7.14 Having Considered this matter in totality, the evidence of the Respondent, the admission and the fact that there was no reason adduced to seek "treatment ", this Panel is not convinced that there are any grounds for reduction of the Period of ineligibility. Accordingly, we are of the view that the Athlete's deliberate assumption of risk must attract the full period of ineligibility of 4 years being a first offender. **[Art.10.3.1. of the ADAK Rules]**

DECISION

This Panel therefore holds as follows:

i. The ADRV has been sufficiently proved. There are no grounds for reduction of sentence. The Respondent shall be ineligible for a period of 4 years with effect from 7th July 2017, that being the date of provisional suspension.
ii. All result obtained by the Respondent from 18th May 2017 inclusive of points and prizes are disqualified.

iii. The parties shall bear their own costs of these proceedings.

Dated at Nairobi this 20th day of *September*, 2018

for Bhivello

John M Ohaga, Panel Chairperson

Njeri Onyango -Member

Mary N Kimani- Member